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No. 06-1463

In The
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Writ Of Certiorari To The California Court Of Appeal For The Second Appellate District, Division One

BRIEF *AMICUS CURIAE* OF THE WILLIAM MORRIS AGENCY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether California's Talent Agencies Act, Cal. Labor Code § 1700 *et seq.*, is preempted by the Federal Arbitration Act, 9 U.S.C. § 2, insofar as California's regulatory system is appropriately-tailored to oversee a unique labor market and recourse to administrative agency review, pursuant to the arbitral clause agreed to by the parties, is not inconsistent with Congress's objective of promoting arbitration?

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BRIEF *AMICUS CURIAE* OF THE WILLIAM MORRIS AGENCY

The William Morris Agency submits this brief as *amicus curiae* on behalf of respondent Alex E. Ferrer.[1]

INTEREST OF *AMICUS CURIAE*

1. Founded in 1898, the William Morris Agency (WMA) is the largest and most diversified talent and literary agency in the world, with principal offices in New York, Beverly Hills, Nashville, London, Miami Beach and Shanghai. The Agency represents clients in all segments of the entertainment industry, including motion pictures, television, music and personal appearances, Broadway theatre and theatrical touring, book publishing, commercial endorsements, sports marketing, corporate consulting, digital media, and video games.

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[1] Pursuant to S.Ct. R. 37.3(a), all parties have consented to the filing of the brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, or its counsel, made a monetary contribution to its preparation or submission.

Amicus Curiae's relationship with Respondent, and the underlying transactions in this case, are fully disclosed in the following section.

In 1898, a young German Jewish immigrant posted a cross-hatch trademark above his door in New York City – four X's, representing a W superimposed on an M – and went into business as "William Morris, Vaudeville Agent." During an illustrious history that spans three centuries, immortalized in print and on stage,[2] the William Morris Agency played an integral role in shaping the face of entertainment. By the time WMA formally incorporated in New York State on January 31, 1918, Morris was joined by son William, Jr., and by Abe Lastfogel as directors of the company.

As silent film grew into an exciting new form of entertainment, Morris was quick to encourage his performing clients to experiment in the new medium while the competition held fast to vaudeville. Stars such as Al Jolson, the Marx Brothers, Mae West and Charlie Chaplin helped forge the Agency's dominance in both New York and Hollywood. The momentum continued to build during the 1920's. Clients included such luminaries as George Jessel. The nascent medium of radio provided yet another frontier to explore. By 1930, after some 32 years at the helm, Morris passed leadership of the agency to his son and Abe Lastfogel. With Morris, Jr. heading the new office in Los Angeles and Mr. Lastfogel running the operation in New York City, the Agency featured an impressive

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[2] See, e.g., Frank Rose, THE AGENCY: WILLIAM MORRIS AND THE HIDDEN HISTORY OF SHOW BUSINESS (1995); *Bye Bye Birdie* (Broadway 1960) (book by Michael Stewart) (Albert Peterson, talent agent for Conrad Birdie, appears to have an affiliation with a thinly-disguised WMA).

roster of clients, including such superstars as Jimmy Cagney, Louis Armstrong and Will Rogers. WMA attained further industry dominance with the December 1949 acquisition of the Berg-Allenberg Agency. New clients included Frank Capra, Clark Gable and Judy Garland, joining a roster that already included Sammy Davis, Jr., Milton Berle and Rita Hayworth.

With the arrival of television, the 1940's also presented yet another entertainment frontier to conquer. Some worried about television's impact on the health of the film industry, but WMA recognized a new business paradigm that would eventually make it possible to package stars, producers, writers and show concepts for sale to corporate sponsors, which controlled television's early days. The following decades brought unimagined success to scores of WMA clients, including Steve McQueen, Frank Sinatra, Andy Griffith, Marilyn Monroe, Elvis Presley, Katharine Hepburn, Jack Lemmon, Walter Matthau, Kim Novak, Dick Van Dyke and Bill Cosby.

By 1965, WMA's Music Department had emerged as an industry powerhouse, representing, among others, the Rolling Stones, the Byrds, the Beach Boys and Sonny & Cher. Less than 10 years later, in 1973, the Agency's newly established Nashville office provided another significant boost to the operations of William Morris, extending the Agency's reach into country music and beyond. During the 1980's, the Agency continued to expand in other ways, acquiring the Jim Halsey Company, adding performers such as The Oak Ridge Boys, Waylon Jennings and Tammy

Wynette.

The early 1990's also brought great success to WMA's Literary Department, which announced the largest book-to-screen deal ever inked when it sold the television rights for "Scarlett," the sequel to Margaret Mitchell's GONE WITH THE WIND. WMA later broke new ground with the creation of the Corporate Advisory/New Media Department, which evolved into William Morris Consulting (WMC). WMC now operates in a broad spectrum of industry segments, including telecommunications, technology, lodging, gaming, publishing, retail, and consumer products.

The Willi am Morris Agency is committed to being a world-class corporate citizen. We believe that the success of our clients and, ultimately, of our Agency is inextricably tied to our role as a socially-responsible company. Since the 1940's, WMA has taken an industry-leading role as a civic-minded organization. Then, as now, our company understands charitable engagement is a critical aspect of our legacy. This conviction has led to the formation of the Lastfogel Foundation of the William Morris Agency, which encourages young people and their families to participate in arts, education, health and the environmental programs dedicated to the communities where we live and work.

2. The William Morris Agency has a tangential involvement in the transaction that underlies this case. As noted above, WMA "packages" the different elements and constituents for successful television programming and content: actors, directors, producers, writers, and show concepts. Not limited to traditional

network boundaries, agents in WMA's television division actively pursue opportunities for their clients covering all commercial, broadcast networks, cable, first-run syndication and international broadcast systems, and spanning an array of programming formats. Today, many television packages represented by the William Morris Agency currently occupy key time slots on television schedules.

Judge Alex, starring the respondent here, Judge Alex E. Ferrer, and syndicated nationwide by Twentieth Century Fox was packaged by the William Morris Agency. WMA receives a "series packaging fee" for this television program, consisting of 5% of gross receipts, which is the standard commission on first run syndication. Judge Alex Ferrer was never a William Morris client, and WMA receives no commission on the salary paid to Judge Ferrer.

In his negotiations with Judge Ferrer, leading to the conclusion of the Personal Management Agreement (PMA) between Arnold Preston and Judge Ferrer of March 6, 2002, Preston represented himself as a licensed talent agent with WMA. See J.A. 8 (in fax cover letter from Ferrer to Preston, Preston is addressed at the William Morris Agency); J.A. 21 (¶ 5) (in fact, Preston was an assistant-trainee at WMA, not a licensed talent agent). Mr. Preston was never promoted from his trainee status, and subsequently was dismis sed from employment with the William Morris Agency.

3. As one of the world's leading talent agencies, the William Morris Agency has an obvious – and substantial – interest in the proper regulation of the

provision of consulting services to all sorts of talent, working in all aspects of the media and entertainment sectors. The statutory scheme at issue in this case, California's Talent Agencies Act, Cal. Labor Code § 1700 *et seq.* (hereinafter "TAA," or "the Act"), is one such approach to ensure the proper licensure and regulation of talent agencies, and to prevent unscrupulous agents from taking advantage of inexperienced, unwitting or vulnerable individuals who seek access to the challenging and demanding entertainment world. Particularly significant, in this regulatory respect, are the modalities of dispute settlement when issues arise – as they inevitably do – in the relationships between artists, their agents and managers, and media enterprises.

California Labor Code §§ 1700.44 & 1700.45, attempts to find an equilibrium between party autonomy in the conclusion of talent contracts and the necessity of government regulation over this service sector. The carefully-wrought statutory scheme protects party autonomy, evidenced by the provision of ADR mechanisms (including arbitration), but also fulfills the need for neutral administrative determinations of the qualifications of talent agents, the propriety of their form contracts, and best practices in the industry. The William Morris Agency endorsed the enactment of rules for theatrical and motion picture agents (as well as artists' managers) through California's Employment Agencies Act in 1937, and supported the TAA when it was adopted in its present form by the California legislature in 1978. WMA continues to support the TAA's operation – as through

the licensure, oversight, and adjudicative decisions of California's Labor Commissioner – to this very day.

Even more particularly, WMA submits that the TAA's provisions for the allowance of stays of arbitration (when the parties select such a dispute settlement mechanism), see Cal. Labor Code § 1700.45, as threshold questions of the Act's applicability are administratively determined, is entirely consistent with Congress's well-stated policy goal, under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, of promoting arbitration and the effective enforcement of arbitral agreements. Far from reflecting some sort of hostility to alternative dispute resolution, California's TAA strikes the right balance between the exercise of a state's legitimate police powers in regulating a service industry (including the manner in which that sector resolves disputes with its constituents), and the need for quick and final resolutions of disputes through arbitration.

STATEMENT

Petitioner and his *amici* have forcefully criticized California's Talent Agencies Act (TAA), Cal. Labor Code § 1700 *et seq.*, as somehow subversive of federal objectives of uniformity in the regulation of commerce and the promotion of arbitration, with nary an appreciation for the legislative history of this enactment and the important public policies underlying this statute. Any consideration by this Court of whether the TAA is preempted by the Federal

Arbitration Act, should at least take passing notice of the regulatory system established by California for the licensure, oversight, and disciplining of talent agents.

In 1913, California legislated an Employment Agencies Act (EAA), which, in recognition of the state's infant entertainment industry, covered "theatrical employment agencies," including "circuses, vaudeville, theatrical and other entertainers, exhibitors, and performers." 1913 Cal. Stat. 515 (ch. 282). A 1937 enactment added the category of "motion picture employment agencies," 1937 Cal. Stat. 230 (ch. 90), and a 1943 amendment augmented the statute to cover "artist managers," defined as persons who "engaged in the occupation of advising, counseling, or directing artists on the development of their professional careers and who procures, offers, or promises employments or engagements of an artist. . . ." 1943 Cal. Stat. 1326 (ch. 329). Even when the EAA was repealed in 1967, artist managers (under the Artists Managers Act) remained under the jurisdiction of the state Department of Labor.

In 1978, the California legislature adopted the Talent Agencies Act in its current form. See 1978 Cal. Stat. ch. 1382, currently codified at Cal. Labor Code § 1700 *et seq*. What had previously been known as "artist managers" were denominated as "talent agents" in the TAA. See Cal. Labor Code § 1700.4 (amended in 1982, 1982 Cal. Stat. ch. 682, to exclude application to those who advise recording artists). In 1982, a comprehensive review of the TAA was conducted by a specially-constituted Entertainment Commission, which consisted of representatives from the artist community (Ed Asner, John Forsythe, and Cicely

Tyson), the talent agency constituency (Jeffrey Berg, Roger Davis, and Richard Rosenberg), and personal managers (Bob Finkelstein, Patricia McQueeny, and Larry Thompson), under the chairmanship of the State Labor Commissioner. See Report of the California Entertainment Commission, May 23, 1985 (transmitted Dec. 2, 1985), Cal. Doc. E2035 R4 1985, at 3-4.

One major issue considered by the Entertainment Commission was whether criminal penalties should be prescribed for those who engaged in the procurement of employment for artists, without being properly licensed under the TAA. The Commission rejected this proposal, and concluded that

> existing civil remedies . . . to anyone who has been injured by the Act, are sufficient to serve the purpose of deterring violation of the Act and punishing breaches. . . . Perhaps the most effective weapon for ensuring compliance with the Act is the power of the Labor Commissioner, at a hearing on a Petition to Determine Controversy, to find that a personal manager or anyone has acted as an unlicensed talent agent and, having so found, declare the contract void from inception and order the restitution to the artist of all fees paid by the artist and the forfeiture of all expenses advanced to the artist.

Id. at 26-27. This compromise – foregoing criminal sanctions against unlicensed talent agents in favor of administrative recourse with the state Labor

Commissioner – is reflected in the TAA itself. See Cal. Labor Code § 1700.44(b).

The TAA provides a comprehensive and strict regulatory regime for talent agents, in order to ensure the welfare of the artists they represent. See *Waisbren v. Peppercorn Productions, Inc.*, 41 Cal. App.4th 246, 254, 48 Cal. Rptr.2d 437 (1995). As a condition for licensure, applicant talent agents are subject to background checks and fingerprinting. See Cal. Labor Code §§ 1700.6 & 1700.7. Agents must also post a surety bond in the amount of $50,000 in order to satisfy any obligations to their clients. See id. § 1700.15. Moneys held by an agent for a client-artist must be in trust. Id. § 1700.25. Under the Act, the Labor Commissioner must approve all form contracts between agents and artists, id. § 1700.23, agents must file their fee schedules with the Commission, id. § 1700.24, and must maintain records for inspection by the Commission. See id. § 1700.27.

The TAA has substantive provisions which prohibit an agent from issuing false, fraudulent or misleading information or advertisements, id. § 1700.32, employing clients in unsafe places, id. § 1700.33, accepting registration or referral fees, or engaging in fee-splitting with employers. See id. §§ 1700.39 & 1700.40. The Act is especially stringent as concerns the relationship between talent agents and artists who are minors. See id. §§ 1700.34, 1700.36 & 1700.37. In the event of agent misconduct, the Labor Commissioner may suspend or revoke that agent's or agency's license. See id. § 1700.21.

The TAA also recognizes an additional overlay of

control of the talent agent profession: by "bona fide labor union[s] regulating the relations of its members to a talent agency." Id. § 1700.45(b). Such franchise arrangements have been recognized in other jurisdictions. See, e.g., *Am. Fed. of Telev. & Radio Artists, AFL-CIO v. Association of Talent Agents*, 576 N.Y.S.2d 575, 576 (N.Y. App. Div. 1991).

In the provisions under dispute in this case, Cal. Labor Code §§ 1700.44 & 1700.45, controversies between agents and artists are to be submitted to the state Labor Commission. The California Supreme Court has construed this provision to mean that the Labor Commissioner has plenary authority even in disputes where a violation of the TAA is raised as a defense. See *Styne v. Stevens*, 26 Cal.4th 42, 26 P.3d 343 (2001).

In a carefully-crafted provision, the California legislature allowed for arbitration of disputes between artists and agents, Cal. Labor Code § 1700.45, provided that certain requisites were satisfied, including that the Labor Commissioner have reasonable notice of the arbitral hearings and the opportunity to attend, id. §§ 1700.45(c) & (d), and that the arbitral proceedings be conducted pursuant to California's Code of Civil Procedure. Section 1700.45 also provides that

> [i]f there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall

not apply to controversies pertaining to the contract.

Id. § 1700.45 (¶ 3).

SUMMARY OF ARGUMENT

A. The law selected by the parties to the underlying contract (the Personal Management Agreement (PMA)) in this case was California law, and California law was expressly applied to the conduct of any arbitral proceedings. J.A. 17-18. Under this Court's holding in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989), party autonomy is to be judicially respected, and if the parties have selected a *lex arbitrii* that allows for stays of arbitration for parallel state judicial or administrative proceedings, no preemptive radiation under the Federal Arbitration Act (FAA) incapacitates such a result. See id. at 474-75, 477, 479. So long as the application of state law does not actually frustrate an ultimate recourse to arbitration, see *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996), anterior state administrative proceedings are permissible.

Such is the case here. California's Talent Agencies Act (TAA) affirmatively allows the arbitration of agent-artist disputes, see Cal. Labor Code § 1700.45, and provides for an administrative procedure prior to arbitration, "even if the result is that arbitration is stayed where the [Federal Arbitration] Act would otherwise permit it to go forward." *Volt*, 489 U.S. at 479. California's Labor Commissioner can make a

non-preclusive ruling that the regulatory interests of the State have been satisfied. The arbitrator in this case, in any event, has indicated that such a determination would be helpful in the disposition of the matter. J.A. 38.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and predecessor cases, the Court held that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Id. at 445-46 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); and *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). The PMA's arbitration provision merged any challenge of the arbitral clause with a dispute regarding the contract as a whole, including the propriety of its formation.

B. There is no inconsistency between the FAA's goal of effectuating contracts that include arbitration as the means of dispute settlement, and allowing certain administrative determinations to also take place. This is particularly so when those administrative proceedings occur prior to the conclusion of the arbitral process and the administrative determinations are non-preclusive in effect. To hold in favor of Petitioner here "would undermine the detailed enforcement scheme created by [California in the TAA and] the substantive statutory prerogative of the [Labor Commissioner] to enforce those claims for whatever relief and in whatever forum the [Labor Commissioner] sees fit[,] simply to give greater effect to an agreement between private parties" to arbitrate. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S.

279, 296 & n.10 (2002).

California's TAA shows a high degree of gracious solicitude to arbitral proceedings. If the parties in an agent-artist relationship wish to employ arbitral mechanisms to resolve their dispute, they need do nothing more than allow the Labor Commissioner to make a threshold determination under the TAA and then give the Commissioner the opportunity to participate in the arbitral proceedings. Indeed, if the requisites of Cal. Labor Code § 1700.45 are fully satisfied, and the proper notice is made pursuant to the contract, the parties can fully waive recourse to the Labor Commissioner.

C. This Court should appreciate the unique nature of the labor market for entertainment and media talent, especially in the context of weighing the application of a federal statutory scheme and its preemptive effect. See, e.g., *United States v. Shubert*, 348 U.S. 222 (1955). Markets in creative talent present unique regulatory challenges, and many states (not just California) have legislated in this field.

California courts, in construing the TAA, have elucidated the significant public policy rationale behind the dispute settlement provisions of the Act and have roundly condemned the tactics of certain agents or representatives who would seek to deny the Act's protections to their artist-clients. See *Styne v. Stevens*, 26 Cal.4th 42, 51, 26 P.3d 343, 349 (2001); *Buchwald v. Superior Court*, 254 Cal. App.2d 347, 355, 62 Cal. Rptr. 364 (1967). Petitioner's attempts to circumvent the TAA, through his audacious interpretation of his own ambiguously-drawn arbitration clause in the PMA,

should be unavailing.

California's Labor Commissioner – under the TAA as part of the applicable law selected by the contract and its arbitration provision – should be able to make an administrative determination as to Petitioner's licensure status and any potential effects it may have on the formation of the contract. No principled pursuit of congressional policy of promoting arbitration, nor any ground for preemption by the Federal Arbitration Act, counsels a different result in this case.

ARGUMENT

A careful review of the parties' agreed-to arbitration clause, in light of the policy objectives and remedial structure of California's Talent Agencies Act (TAA), should lead this Court to conclude that resort to administrative determinations, prior to (and not preclusive of) arbitration, does not offend Congress's policy of promoting the effective enforcement of arbitral agreements under the Federal Arbitration Act (FAA).

A. Principles of Party Autonomy, as Effectuated by the FAA, Dictate the Application of Administrative Procedures under California's Talent Agencies Act to Disputes Arising Under this Contract.

1. An essential policy objective of the FAA, as legislated by Congress, is to effectively enforce freely-bargained-for contracts between private parties that select arbitration as the method for resolving disputes

under those agreements. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989) ("The FAA was designed 'to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate,' *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. [213], at 219-220 [(1985)], and to place such agreements ' "upon the same footing as other contracts," ' *Scherk v. Alberto-Culver Co.*, 417 U.S. [506], at 511 [(1974)] (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924))."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so.").

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court observed that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Id. at 628; see also *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 242 (1987) ("Accordingly, the McMahons, 'having made the bargain to arbitrate,' will be held to their bargain. Their RICO claim is arbitrable under the terms of the Arbitration Act.").

A key corollary to this principle of party autonomy under the FAA is that if the parties, by virtue of their contract, have selected an applicable law that includes procedures for the interaction of arbitral, administrative and judicial mechanisms for dispute settlement, these state-law procedures should be respected. This was confirmed by this Court in *Volt*,

where at issue was a construction contract that included an arbitration provision, but which also selected California law as the applicable law of the contract. See 489 U.S. at 470. Volt petitioned a California trial court to compel arbitration; Stanford sought a stay of arbitration pursuant to Cal. Civ. Proc. Code Ann. § 1281.2(c) (West 1982) (still in force), which permitted "a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where 'there is a possibility of conflicting rulings on a common issue of law or fact'." Id. at 471.

Volt resisted the application of a stay, under California procedural law, as being preempted under the FAA. The Court rejected this challenge, "conclud[ing] that even if §§ 3 and 4 of the FAA are fully applicable in state-court proceedings, they do not prevent application of Cal. Civ. Proc. Code Ann. § 1281.2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law." Id. at 477. The Court elaborated on this holding by noting that

> it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are

> generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

Id. at 479 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Finally, this Court concluded that the FAA did not preempt the California statute because "the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed in the manner provided for in [the parties'] agreement'." 489 U.S. at 474-75 (quoting 9 U.S.C. § 4).

2. A careful review[3] of the choice-of-law and arbitration provisions in the Personal Management Agreement (PMA) between Preston and Ferrer of March 6, 2002, J.A. 8, 17-18 (¶¶ 12 & 13), indicates that the parties intended that California's procedural law be applied to any arbitration between the parties. Paragraph 12 of the PMA provides in pertinent part that "[t]his agreement shall be governed by the laws of the state of California, applicable to agreements wholly entered into and performed herein." J.A. 17. Paragraph 13 of the PMA (denominated "Arbitration") reads in full as follows:

> In the event of any action, suit or proceeding arising from or based upon this Agreement brought by either party hereto against each other, the prevailing party shall be entitled to recover from the other attorneys['] fees in connection therewith in addition to the costs of such action, suit or proceeding. In the event of any dispute under or relating to the terms of this agreement, or the breach, validity,

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[3] This Court has been hitherto hindered in making such an examination. Preston's Petition studiously avoided quoting the arbitration clause in full, detracting from its plain meaning. See Pet. 3 (citing Pet. App. 6a) (referencing the California Court of Appeal decision, which referred to the provision as a "standard American Arbitration Association (AAA) arbitration clause." See 145 Cal. App.4th at 443). Likewise, Preston's brief fails to quote the provision fully. See Pet. Br. 3.

> or legality thereof, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in the city of Los Angeles, California, and in accordance with the rules promulgated by the said association, and judgment upon the award rendered by the arbitrator(s), may be entered into any court having jurisdiction thereof. Nothing in this agreement shall be construed to require any act contrary to any law or regulation of any guild or union. If there is any conflict between this agreement and any present or future law, the latter shall prevail, but in such an event, the provisions of such agreement shall be curtailed only to the extent necessary to bring it within the requirements of said law, rule or regulation.

J.A. 17-18 (¶ 13).

Despite Petitioner's assertion, see Pet. 3; Pet. Br. 3, and the conclusory statement of the California Court of Appeal, see 145 Cal. App.4th at 443, it is by no means clear that this is, in its entirety, a "standard American Arbitration Association (AAA) arbitration clause." See id. At least for commercial disputes arising under a contract concluded by the parties, the AAA recommended the following arbitration clause:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration

> Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), Amended and Effective July 1, 2003, http://www.adr.org/sp.asp?id=26396#stan (last visited Dec. 5, 2007). The "standard" AAA arbitration clause thus covered "any controversy or claim" arising out of a contract, "or the breach thereof." Id. The PMA proposed by Preston, and signed by Ferrer, covered, instead, "any dispute under or relating to the terms of this agreement, or the breach, validity, or legality thereof. . . ." J.A. 18.

The additional coverage of the arbitral clause in the PMA must, however, be read in light of the particular choice-of-law provision embedded into the arbitral clause:

> If there is any conflict between this agreement and any present or future law, the latter shall prevail, but in such an event, the provisions of such agreement shall be curtailed only to the extent necessary to bring it within the requirements of said law, rule or regulation.

J.A. 18. This choice-of-law provision speaks specifically to the procedural and substantive law for the arbitration. After all, the PMA already had provided a

general choice-of-law determination. See J.A. 17 (¶ 12) ("[t]his agreement shall be governed by the laws of the state of California, applicable to agreements wholly entered into and performed herein.").

3. The parties' designation of California law as the applicable law governing any dispute settlement procedure (including recourse to arbitration), has two broad consequences for the outcome of this case, necessitating the affirmance of the decision below.

a. The first, as already suggested, is that because "where, as here, the parties have agreed to arbitrate in accordance with California law," *Volt Information Sciences*, 489 U.S. at 477, the FAA does not preempt the terms of California's Talent Agencies Act, insofar as Cal. Labor Code § 1700.45 provides for an administrative procedure anterior to arbitration, "even if the result is that arbitration is stayed where the [Federal Arbitration] Act would otherwise permit it to go forward." Id. at 479.

This Court has consistently construed its decision in *Volt* as preserving the autonomy of contract parties to select dispute settlement mechanisms which mix arbitral, administrative and judicial features. See *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) ("Rather the relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures, cf. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-476 (1989). It concerns contract interpretation and arbitration procedures."); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514

U.S. 52, 57 (1995) ("We have previously held that the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties.") (citing *Volt*).

As this Court made clear in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), "[w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, *Volt*, 489 U.S., at 476, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." Id. at 293; see id. at 293 n.9 ("We concluded [in *Volt*] that the FAA did not pre-empt the California statute because 'the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement"'." (quoting *Volt*, 489 U.S. at 474-475 (quoting 9 U.S.C. § 4)).

Party autonomy in these situations can be preserved, and state procedural law can be applied to stay an arbitration, so long as the application of state law does not actually frustrate an ultimate recourse to arbitration. See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) ("The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself."); *Byrd*, 470 U.S. at 219 (rejecting "the suggestion that overriding goal of the [FAA] was to promote the expeditions resolution of claims," allowing for stays of arbitral proceedings).

That is precisely the situation here. The

application of California's TAA, Cal. Labor Code § 1700.45, merely stays the arbitral proceedings, in order for the state Labor Commissioner to make a non-preclusive ruling that the regulatory interests of the State (including a determination of whether Preston is actually a properly-licensed talent agent) have been satisfied. Needless to say, this determination would be quite helpful in the disposition of the matter, as, indeed, the arbitrator indicated here. See J.A. 38 (¶ 5(ii)) ("the results of the Labor Commissioner hearing could also inform the Arbitrator as to the remedy or relief that would be just and equitable under the circumstances of this case.").

Under the terms of the contract agreed to by Preston and Ferrer,[4] California's procedural law, including TAA section 1700.45, can be applied to stay the arbitration. Such an application of state procedural law is not preempted by the Federal Arbitration Act, as per this Court's decision in *Volt*.

b. The structure and intent of the party's agreement to arbitrate also counsels an affirmance of

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[4] Significantly, the PMA's arbitration clause did *not* contain a provision opting-out of Labor Commission determinations of disputes, as required by Cal. Labor Code §§ 1700.23 & 1700.45(3) ("If there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.").

the decision below in light of this Court's ruling in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and predecessor cases. In *Buckeye*, the Court held that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Id. at 445-46 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); and *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)); see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

Petitioner has made much of the assertion that Ferrer has never challenged the validity of the arbitration clause itself. See Pet. Br. 6, 11. And, indeed, the court below suggested that the thrust of Ferrer's position was that the PMA was void *ab initio* because Preston was not a licensed talent agent under the TAA. See Pet. App. 3a-10a; 145 Cal. App.4th at 444. Ferrer's position, taken before the California Superior Court, and as reflected in his complaint for declaratory and injunctive relief, was rather more nuanced. See J.A. 27 (¶ 5) ("Plaintiff contends that (a) the Contract is void by reason of Defendant's attempt to procure employment for Plaintiff in violation of [the TAA], [and] (b) the Contract's arbitration clause does not vest authority in an arbitrator to determine whether the contract is void. . . .").

The peculiar structure of the PMA's arbitration clause – as drafted by Preston and dispatched to Ferrer for his emendations and approval (see J.A. 8) – essentially merges any challenge of the arbitral clause with a dispute regarding the contract as a whole,

including the propriety of its formation. After all, the arbitral clause specifically references the application of California law in this respect. J.A. 18 (¶ 13) ("If there is any conflict between this agreement [to arbitrate[5]] and any present or future law, the latter shall prevail, but in such an event, the provisions of such agreement shall be curtailed only to the extent necessary to bring it within the requirements of said law, rule or regulation.").

However the application of the California law selected by the parties is viewed – whether as governing the procedure of the dispute settlement mechanisms (including the possibility of a stay of arbitration) or as a substantive provision determining the manner of challenging the PMA's formation as a contract – the identical result is reached here. The parties have agreed to the application of the Talent Agencies Act, and under either the *Volt* precedent or the *Prima Paint-Southland-Buckeye* line of decisions, there is no preemption by the Federal Arbitration Act.

B. Recourse to State Administrative Determinations, Anterior to Arbitration, Does Not Undermine the FAA.

Petitioner and his *amici* have sought to frame this case as whether this Court's ruling in *Buckeye*

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[5] This interlineation is perfectly appropriate since the previous sentence reads, in pertinent part, "it is *agreed* that the same [the dispute] shall be submitted to arbitration. . . ." J.A. 18 (emphasis added).

Check Cashing, Inc. v. Cardegna, 546 U.S. 400 (2006), ought to be extended to situations where state law provides for an administrative procedure before arbitration. As suggested by the previous discussion, based on the peculiarities of the arbitration agreement between Preston and Ferrer, it appears that the parties actually consented to the involvement of California's Labor Commissioner, under the TAA, to make a determination of certain threshold issues under the Act. Chief among these was whether Preston was a duly-licensed talent agent, and, if not, whether the PMA (including its arbitration clause) was void *ab initio*. To the extent that the PMA – which was, after all, drafted by Preston – merged the threshold validity of the contract with the agreement to arbitrate, Petitioner should hardly be seen as now complaining of the involvement of the California Labor Commissioner in making a determination in a procedure that is required under the applicable law expressly selected by contract. See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 248 (1995) (O'Connor, J., concurring in part) ("If the court finds the language to be ambiguous, it might invoke the familiar rule that the contract should be construed against its drafter, and thus that respondents should receive the benefit of the doubt.") (quoting 2 E. Farnsworth, FARNSWORTH ON CONTRACTS § 7.11, at 265-68 (1990)).

But, even putting aside the particular bargain made by the parties here, it is not inconsistent with the goal of the FAA in effectuating contracts that include arbitration as the means of dispute settlement, to allow certain administrative determinations to also take place. This is especially so when those administrative

proceedings occur prior to the conclusion of the arbitral process and the administrative determinations are non-preclusive in effect.

Amicus is mindful that this Court has, in other contexts, indicated that recourse to an administrative procedure does not necessarily preclude arbitration. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231 (1987). Both *Gilmer* and *McMahon* involved federal administrative schemes, the Age Discrimination in Employment Act (ADEA) and the Securities Exchange Act, respectively. In *Gilmer*, the Court acknowledged that administrative proceedings through the EEOC, under the ADEA, can occur in tandem with arbitration of employment disputes. See 500 U.S. at 28 ("An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action."). Likewise, in *McMahon*, this Court's concern was whether arbitration would diminish the effectiveness of section 10(b) claims under the Securities Exchange Act, and concluded it would not. See 482 U.S. at 232-33.

In its discussion in *Gilmer*, this Court generally considered the potential interplay of arbitral and administrative mechanisms:

> The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration. "[S]o long as

> the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."

500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

This holding was further clarified in this Court's decision in *Waffle House*, where it was argued that an arbitral agreement between two private parties precluded an administrative agency (in that instance, the EEOC) from seeking victim-specific relief on behalf of an aggrieved employee. See 534 U.S. at 290-96. The Court rejected this proposition and concluded that

> pursuant to Title VII and the ADA, whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function.
>
> We have held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum. . . . To the

> extent the Court of Appeals construed an employee's agreement to submit his claims to an arbitral forum as a waiver of the substantive statutory prerogative of the EEOC to enforce those claims for whatever relief and in whatever forum the EEOC sees fit, the court obscured this crucial distinction and ran afoul of our precedent.

Id. at 296 & n.10 (citations omitted).

The combined teaching of these precedents, as relevant to this case, is that arbitral and administrative mechanisms can co-exist under a state statutory scheme without running afoul of FAA preemption. This is particularly so where, as here (but unlike in *Waffle House*), the parties did appear, in the PMA, to "contemplate the [California Labor Commissioner's] statutory function." 534 U.S. at 296. Even more importantly, administrative determinations under the TAA neither preclude subsequent arbitral proceedings (although they may stay them), and any determinations made by the Labor Commissioner are not necessarily binding on the arbitrator.

Moreover, it is important to emphasize, as noted above, *supra* at 8-10, that California's TAA was expressly designed to create a system of regulatory control over talent agents (and their relations with artist-clients) that would substitute for the imposition of *criminal* penalties for an individual acting as a talent agent without a license. See Report of the California Entertainment Commission, May 23, 1985 (transmitted Dec. 2, 1985), Cal. Doc. E2035 R4 1985, at 26-27 ("existing civil remedies . . . to anyone who has been

injured by the Act, are sufficient to serve the purpose of deterring violation of the Act and punishing breaches. . . . "); see also Cal. Labor Code § 1700.44(b); *Yoo v. Robi*, 126 Cal. App.4th 1089, 1104, 24 Cal. Rptr.3d 740, 750 (2005); *Waisbren*, 41 Cal. App.4th at 262, 48 Cal. Rptr. at 437. To hold in favor of Petitioner here "would undermine the detailed enforcement scheme created by [California in the TAA and] the substantive statutory prerogative of the [Labor Commissioner] to enforce those claims for whatever relief and in whatever forum the [Labor Commissioner] sees fit[,] simply to give greater effect to an agreement between private parties" to arbitrate. *Waffle House*, 534 U.S. at 296 & n.10.

Petitioners and his *amici*'s arguments mischaracterize the nature of administrative proceedings under the TAA, and should be unavailing. It is true that a determination made by the Labor Commissioner under the TAA is subject to judicial review *de novo*. See Cal. Labor Code § 1700.44(a). Ironically enough, this provision was included for the protection of talent agents (putative or real), such as Preston, in the event the Labor Commissioner entered a determination that was unfavorable to their interests. See id. (providing for the posting of an appeal bond "not exceeding twice the amount of the judgment," on the assumption that judgments would be rendered against talent agents in favor of client-artists). But such judicial review, even assuming it is initiated by either of the parties here, would not necessarily be preclusive on the decision of the arbitrator.

Likewise, there is no suggestion that the TAA has been construed as erecting an impermissible

impediment or bar to arbitration in cases such as this. Insofar as the TAA establishes an exhaustion of administrative remedies requirement, such is equally applied to judicial and arbitral proceedings. The California Supreme Court made clear in *Styne v. Stevens*, 26 Cal.4th 42, 26 P.3d 343 (2001), that a pending case in state superior court must be stayed in favor of Labor Commissioner determinations under the TAA, even if a TAA violation is raised as a defense in the judicial proceeding. See id. at 54-55, 26 P.3d at 351-52. There is no intelligible reason that a different result should apply in an instance where the parties have selected arbitration as the means of dispute settlement.

In short, far from exhibiting some hostility or animus to arbitration in disputes between artists and their agents, the TAA shows a high degree of deference to arbitral proceedings. The provisions of Cal. Labor Code § 1700.45 are by no means difficult to satisfy if the parties wish to employ arbitral mechanisms to resolve their dispute. Assuming there is even a "controversy" under the Act to resolve, see id. § 1700.44(a), the Act's provisions demand nothing more than allowing the Labor Commissioner to make a non-preclusive finding under the TAA, and then giving the Commissioner the opportunity to participate in the arbitral proceedings. Indeed, if the requisites of section 1700.45 are fully satisfied, and the proper notice made under the contract is made, the parties can fully waive recourse to the Labor Commissioner. See id. ("If there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for

adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.").

The hard truth of this case is that Mr. Preston drew-up the PMA in a form that had never been approved by the Labor Commissioner, under Cal. Labor Code § 1700.23. He had the opportunity to draft an arbitration clause that, at once, fully complied with section 1700.45 and clearly expressed the intent of the parties to waive recourse to the Labor Commissioner. Instead, he drafted a clause that incorporated *sub silentio* the TAA as part of the law governing the arbitral procedure, hoping this would satisfy the reasonable, opt-out and notice requirements of section 1700.45. This "constructive ambiguity" – if that is what it can charitably be described as – should not redound to Preston's benefit here. That Preston seeks to avoid a potential administrative determination by the Labor Commissioner that he was not a licensed talent agent under the TAA, and thus that the opt-put provisions for arbitration under section 1700.45 could never apply, may be deeply embarrassing to him. That Preston might be hung figuratively on the petard of his own defective drafting in the PMA should be of no moment to this Court. In any event, the operation of the TAA in this fashion hardly rises to the level of an impediment to a federal policy favoring the preemptive effect of the FAA in this case.

C. California's TAA Regulates a Unique Labor Market for Entertainment and Media Talent, and its Arbitral Provisions Should Not be Preempted by the FAA.

Amicus is mindful that this Court has hitherto indicated that the vindication of significant social policies, whether in federal or state law or actuated by judicial or administrative review, is not a ground to avoid the FAA's preemptive effect or to invalidate the use of arbitration in resolving disputes. See *Green Tree*, 531 U.S. at 90 ("These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because '"so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,"' the statute serves its functions.") (quoting *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637))).

Nevertheless, it may be helpful for this Court to fully appreciate the unique nature of the labor market for entertainment and talent media, especially in the context of weighing the application of a federal statutory scheme and its preemptive effect. See, e.g., *Columbia Artists Management, Inc. v. United States*, 381 U.S. 348 (1965) (per curiam) (booking and managing of concert artists); *United States v. Shubert*, 348 U.S. 222 (1955); *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923), on remand, 12 F.2d 341 (2d Cir. 1926), cert. denied, 273 U.S. 703 (1926) (application of the Sherman Act to vaudeville and theatrical productions).

It has been well-documented in economic, sociological, and industrial relations literature that

markets in creative talent present unique regulatory challenges. See William J. Baumol & William G. Bowen, PERFORMING ARTS: THE ECONOMIC DILEMMA (1966); Richard E. Caves, GETTING OUR ACT TOGETHER: THE ECONOMIC ORGANIZATION OF CREATIVE INDUSTRIES (2000); Pierre-Michel Menger, *Artistic Labor Markets and Careers*, 25 ANN. REV. SOCIOLOGY 541 (1999). This has been particularly observed in the motion picture and television production industries. See Darlene C. Chisholm, *Profit-Sharing versus Fixed-Payment Contracts: Evidence from the Motion Pictures Industry*, 13 J. L., ECON. & ORGANIZATION 169 (1997); Alan Paul & Archie Kleingartner, *Flexible Production and the Tranformation of Industrial Relations in the Motion Picture and Television Industry*, 47 INDUSTRIAL & LABOR RELATIONS REV. 663 (1994); Susan Christop'erson & Michael Storper, *The Effects of Flexible Specialization of Industrial Politics and the Labor Market: The Motion Picture Industry*, 42 id. 331 (1989). Talent agents and artist managers are key players in the process of connecting artists with content producers. See Michael Cieply, *Tilting Hollywood's Balance of Power to Talent Agency Clients*, N.Y. TIMES, March 19, 2007, at C1; William T. Bielby & Denise D. Bielby, *Organizational Mediation of Project-Based Labor Markets: Talent Agencies and the Careers of Screenwriters*, 64 AM. SOCIOLOGICAL REV. 64 (1999).

It is for these reasons that the profession of talent agents and the practice of procuring employment for artist-clients have been subject to regulation in many states, and not just California. See, e.g., Ariz. Rev. Stat. § 23-521(A) (2007); Ariz. Admin. Code R20-5-328 (2007)

(subjecting talent agents, within certain definitions, to regulation as an employment agency); Fla. Stat. Ann. § 468.415 (2007) (sexual misconduct in the operation of a talent agency); La. Rev. Stat. Ann. § 23:251(B) (2007) (employment of minors by talent agencies); N.Y. Arts & Cult. Aff. Law § 37.07(1) (McKinney 2007) (advertising limits for talent agents and artist managers). Where talent agent regulation through arbitral processes has been an issue, it has been ruled that the arbitrability of such disputes must be decided by courts in light of the parties' agreement and the context of state law. See *Am. Fed. of Telev. & Radio Artists, AFL-CIO v. Association of Talent Agents*, 576 N.Y.S.2d 575, 576 (N.Y. App. Div. 1991).

California courts, in construing the TAA, have elucidated the significant public policy rationale behind the dispute settlement provisions of the Act and have roundly condemned the tactics of certain agents or representatives who would seek to deny the Act's protections to their artist-clients. In *Buchwald v. Superior Court*, 254 Cal. App.2d 347, 62 Cal. Rptr. 364 (1967), a case decided under the old Artist Managers Act, but with substantially the same operative provisions as the TAA, the court held that the statute applied to a contract even if its terms appeared to disclaim that services for the procurement of creative employment were being provided. See id. at 355, 62 Cal. Rptr. at 370 ("Clearly the Act may not be circumvented by allowing the language of the written contract to control [otherwise] [t]he form of the transaction, rather than its substance would control.").

As another California court has held:

> [t]he rationale for denying a personal manager recovery even for activities which were entirely legal is based on the public policy of the Act to deter personal managers from engaging in illegal activities. Knowing they will receive no help from the courts in recovering for their legal activities, managers are less likely to enter into illegal arrangements. In *Waisbren*, the court observed one reason the Legislature did not enact criminal penalties for violation of the Act was "because 'the most effective weapon for assuring compliance with the Act is the power . . . to declare any contract entered into between the parties void from the inception.' "

Yoo, 126 Cal. App.4th at 1103-04, 24 Cal. Rptr.3d at 749-50 (quoting *Waisbren*, 41 Cal. App.4th at 262 (quoting from the 1985 California Entertainment Commission report)). This policy rationale and remedial structure of the TAA has been confirmed by the California Supreme Court. See *Styne*, 26 Cal.4th at 51, 26 P.3d at 349 ("In furtherance of the Act's protective aims, an unlicensed person's contract with an artist to provide the services of a talent agent is illegal and void.") (citing *Waisbren* and *Buchwald*).

Petitioner's attempts to "circumvent" the TAA, *Buchwald*, 254 Cal. App.2d 347, 62 Cal. Rptr. 364, through his creative interpretation of his own ambiguously-drawn arbitration clause in the PMA, should be unavailing. If, in fact, he was unlicensed as

a talent agent at the time of the execution of the PMA, its terms (including the arbitration clause) are void *ab initio*.

Obviously, the arbitrator is free to reach whatever conclusions he can on this point. Preston is not at liberty, however, to circumvent the authority of California's Labor Commissioner – under the TAA as part of the applicable law selected by the contract and its arbitration provision – to make an administrative determination as to Preston's licensure status and any potential effects it may have on the formation of the contract. And, indeed, the arbitrator has expressed his interest in such a determination. See J.A. 38 (¶ 5(ii)) ("the results of the Labor Commissioner hearing could also inform the Arbitrator as to the remedy or relief that would be just and equitable under the circumstances of this case."). No principled pursuit of Congress's policy of promoting arbitration, nor any ground for preemption by the Federal Arbitration Act, counsels a different result in this case.

CONCLUSION

The decision of the California court of appeal should be affirmed.

Respectfully submitted,

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